viction on count Ninth (transportation from the Southern District of New York to California) but affirmed on the Eighth count (transportation from the Southern District of New York to Illinois), and on the Tenth count (conspiracy) (833).

On petition for rehearing the Court of Appeals, after requesting and receiving a further brief from the prosecutor, wrote a further opinion adhering to its original holding (855-858).

The forged securities alleged to have been transported were forged American Express Travelers Cheques. There was no evidence and no claim that petitioner had anything to do with their printing. There was no evidence that petitioner had the least connection with or knowledge of the existence of the cheques or of their intended transportation until August 19, 1949. According to the government's witness Larigan, who was one of the check passers, there was a meeting on that evening at a restaurant in the Southern District of New York at which petitioner was present, and there was discussion as to what cities should be chosen for the cashing of the checks (199-204). Two days later Larigan and two others took the plane at La Guardia Field, in the Eastern District of New York, and flew to Chicago, taking the checks with them (210-211).

There is evidence that two days after the checks got to Chicago petitioner was there, and when the check passers went from Chicago to Los Angeles, petitioner also went.

The Court of Appeals reversed the conviction on the Ninth count for the reason that there was no proof of any purpose to transport to California until after the parties had arrived in Chicago (1011), but refused to reverse the conviction on the Eighth count notwithstanding the fact that the checks were not transported from or through the Southern District of New York.

POINTS

FIRST

Petitioner was indicted for transporting in interstate commerce forged securities from the Southern District of New York. The proof showed that the securities were transported, not from the Southern District of New York but from the Eastern District of New York. Nevertheless, the Court of Appeals affirmed the conviction on the eighth count on the theory that the jury must have found that accessorial acts were committed in the Southern District of New York. Nothing was said about that in the indictment. Nothing was said about that in the court's instructions. The court charged the jury that the problem was to find whether there was transportation "from the State of New York" to another state. Whether the jury did or did not find beyond a reasonable doubt that accessorial acts were committed in the Southern District of New York, no one can say. The finding of the Court of Appeals that accessorial acts were so committed was an original finding, beyond the power of that court, and apparently made in conflict with an applicable decision of this Court.

The counterfeit checks were printed in the Southern District of New York and delivered by the printer to a man named Faucella in July, 1949 (93, 116). The indictment fixes the date as "on or about July 25, 1949" (27). What happened to them after that, we do not know. The only proof is that about a month later there was, for the first time, talk about taking the checks to other states to cash them, they were already in Brooklyn in the Eastern District of New York, and it was from La Guardia Field in the latter district that the checks went by air to Chicago

(210-211). The Court of Appeals held that the evidence showed that transportation was from and through other districts than that in which the indictment was found, that "there was no evidence that they [the checks] were within the Southern District of New York when their interstate transportation to Chicago was planned at the meeting on August 19" (830).

This failure to prove the crime charged was brought to the trial court's attention by motion (663-664) and again by exception to the charge and request for an instruction that the indictment alleged interstate transportation within the Southern District of New York.

When these matters were brought to the attention of the Court of Appeals that court said that petitioner's argument "fails to recognize that Gillette became an accessory in Manhattan [Southern District] on August 19th to the later transportation to Chicago because at the meeting in the restaurant he counseled, aided and abetted it." At common law, said the court, petitioner would have been an accessory and would be triable in the district where the accessorial acts took place, but since 18 U. S. C. §2 makes him who counsels, aids or abets a principal the common law is not "superseded" but the government is given "an additional venue" (830-831).

The court then had to face the problem that the trial judge not only had submitted no such proposition to the jury but had told them that "The charge here is that the checks * * * were carried from the State of New York to other States," ignoring entirely that the jury's burden was to find an offense within the *district* (22). The court had to concede that this was error since "under the Sixth Amendment proof of venue is an indispensable part of the prosecution's case" (831). But, reasoned the court, "the instruction could not have affected the verdict and was a non-prejudicial error" because it was "highly improbable" that the jury "might not have believed Larigan's

testimony as to the part Gillette took in the meeting of August 19th" (832). The witness Larigan had testified that at this meeting Gillette stated that he "would meet us in Chicago," that "he, Gillette, wanted to go to supervise this thing" (203-204).

When counsel, by petition for rehearing, pointed out that an appellate court was making an original finding of fact not made by the jury, contrary to the admonition of this Court in *Bollenbach* v. *United States,* 326 U. S. 607, the Court wrote another opinion in which it said that further study of the charge convinced the court that the jury "necessarily found that he [petitioner] abetted in Manhattan the interstate transportation to Chicago" (1386), since the trial judge charged that petitioner could not be guilty of transportation unless he aided and abetted, inasmuch as he did not carry the checks himself, and "the only evidence of his participation in the scheme prior to the arrival of the checks in Chicago was Larigan's testimony as to what occurred at the meeting in Manhattan on August 19th. Hence the jury must have believed this testimony" (857).

Putting aside, for the moment, the questions whether the Sixth Amendment permits one to be prosecuted not where the crime is committed, but where it is counseled or advised, and whether one may be convicted on an indictment charging transportation from one district by proof of transportation from another, which we discuss in Points Second and Third (*post*), did the Court of Appeals make an original finding of fact? This Court has pointed out in *Bollenbach* v. *United States,* 326 U. S. 607, 614-615, that

> "* * * it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according

to the procedure and standards appropriate for criminal trials in the federal courts."

* * * * *

"In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be" (326 U. S. at 614-615).

Petitioner submits the court erred in assuming that the jury "necessarily found" that petitioner performed "accessorial acts" in the Southern District of New York for these reasons.

(a) Nowhere was the jury charged, as it should have been, that petitioner could not be guilty unless it was found beyond a reasonable doubt that (1) he did attend a meeting in the Southern District of New York and (2) what he did and said there constituted aiding or abetting, counseling or advising transportation from another district. It was the duty of the jury not only to find the facts beyond reasonable doubt but to appraise them beyond reasonable doubt. If the New York meeting were conceded it would still be a jury problem to appraise its effect.

Dinger v. *United States,* 28 Fed. (2d) 548, 550, 551;
Fosse v. *United States,* 44 Fed. (2d) 915;
United States v. *Gollin,* 166 Fed. (2d) 123, *cert. den.,* 333 U. S. 875;
Billeci v. *United States,* 184 Fed. (2d) 394, 401.

What a jury would have done if properly instructed, nobody knows, particularly since there is no evidence of such a meeting except in the testimony of the witness Larigan, who had been a criminal since childhood (192-193, 233-244), testimony made only after considerable leading (203-204) and which was forgotten on cross (265).

(b) There is plenty of evidence that petitioner was in Chicago when the checks were being cashed there. Indeed, petitioner's own witnesses said so, although they explained petitioner's presence by legitimate business affairs (638-640). Because the jury considered the evidence of petitioner's presence and association in Chicago sufficient to connect him with the scheme to transport, it does not follow that they believed Larigan sufficiently to convict had they been instructed on the court's accessorial theory. To show that one is connected with a scheme does not require proof of acts before the scheme was effected. Connection may sometimes be inferred from what is done afterward. Indeed, the trial court expressly left it to the jury to determine from the whole record, not just from the testimony of Larigan, whether petitioner aided or abetted. The court charged:

> "Gillette is charged in three counts. There is testimony that he was present in New York and the matter was talked about, the plan. The Government says that he was in Chicago and that he was in Los Angeles. * * * You have heard all the testimony as to that, as to how he registered at the hotel, as to his meeting with these people, as to his goings, as to his comings, as to his associations, and those are facts which you, ladies and gentlemen, are to pass upon" (763).

(c) That the jury was permitted, indeed required to decide on the whole record is further demonstrated by what

the trial judge charged as to the co-defendant Borda. The ninth count of the indictment, which was reversed, charged transportation from the Southern District of New York to Los Angeles. Borda cashed some checks in Los Angeles. There was no evidence, not a bit, that Borda ever spoke a word in the Southern District of New York. The only proof is that he arrived in Los Angeles very soon after the checks got there, having come from Philadelphia, and that after he got to Los Angeles he started to cash checks. Nevertheless, the court submitted to the jury the question whether Borda was guilty of the substantive offense of transportation. The court said:

> "• • • If there were an understanding, an agreement that Borda was to travel to Los Angeles by some independent means from the person who actually conveyed the checks and he knew the checks were going from here to Los Angeles—that is necessary—and then that they met in Los Angeles and he had knowledge that he was handling the New York counterfeit checks, then he would be equally guilty of the substantive offense of aiding or abetting in the transportation of those checks" (762).

Could the jury have conceived that there was one law for Borda and another for petitioner? It is unthinkable. Since the jury was told that it might infer from Borda's conduct in Los Angeles that an understanding preceded actual transportation and if there were such an understanding Borda was just as guilty as though he had transported them himself, it must have understood that it was privileged to draw the same inference from petitioner's conduct in Chicago.

To assume that the jury "necessarily" believed a character such as Larigan is pure guesswork.

SECOND

The indictment charges transportation from the Southern District of New York. That transportation was not proved. The Court of Appeals upheld the conviction upon the theory that petitioner became an "accessory" in the Southern District of New York. But the indictment does not allege that petitioner became an "accessory" in the Southern District of New York. It charges actual transportation from the Southern District of New York to a district in another state.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and proper trial by an impartial jury of the State and district wherein the crime shall have been committed * * *"

This indictment charges a crime, *viz.*, transportation from the *Southern* District of New York. The proof showed transportation from the *Eastern* District. How could petitioner be tried in a district other than the one "wherein the crime shall have been committed"?

Because of the Sixth Amendment questions of venue "raise deep issues of public policy."

United States v. *Johnson*, 323 U. S. 273, 276.

The Court of Appeals endeavored to avoid the fact that the indictment charges an offense in one district whereas the proof shows an offense in a different district on the ground that although the indictment erroneously alleged that transportation took place "from the Southern District of New York petitioner had counseled and advised transportation from the latter district." We shall consider the court's accessory theory in the next point. It is suffi-

cient to say now that the Grand Jury did not charge petitioner with accessorial acts in the Southern District of New York; it charged him with actual interstate transportation from that district, and the proof showed there was no such transportation by him or anyone else.

If the indictment had charged, according to the fact, that transportation was between districts outside the jurisdiction of the court, it would have had to be dismissed because:

> "It must be conceded that under the Sixth Amendment to the Constitution the accused could not be tried in one district on an indictment showing that the offense was not committed in that district" (*Salinger* v. *Loisel,* 265 U. S. 224, 232).

It makes no difference, therefore, whether the Court of Appeals was correct or in error in believing that the jury necessarily found the facts in accordance with the verdict. The Fifth Amendment commands that defendant should not be required to answer the charge of transporting from the Eastern District of New York until he had first been accused by a Grand Jury of that very offense. He was never so accused. To permit the indictment to be amended *sub silentio,* as it was here, put petitioner to trial on an accusation which was *not* the accusation of the Grand Jury and which ousted the court of jurisdiction to proceed further.

Ex parte Bain, 121 U. S. 1.

THIRD

"Although the proof showed that the offense was committed outside the jurisdiction of the Court, the Court of Appeals held that petitioner was properly convicted, nevertheless, because there was proof of accessorial acts within the jurisdiction of the court. The Court of Appeals reasoned that since, at common law, an accessory is triable where accessorial acts are committed, since the statute makes him who aids or abets, counsels or advises, a principal, this "does not supersede the common law of venue but provides an additional venue" (831). The court overlooked the fact that there are not and never were accessories before the fact under federal law, and hence when one who aids or abets was made a principal, there was no pre-existing rule of venue to broaden. Furthermore, the Court of Appeals ignored the Sixth Amendment to the Constitution which requires crimes to be prosecuted in the district "where the crime shall have been committed," not where it was counseled or advised. Also it must have overlooked so much of the Sixth Amendment as requires that one "be informed of the nature and cause of the accusation."

The Court of Appeals endeavored to avoid the fact that petitioner was charged with transporting from the wrong district by finding that he counseled and advised in the district named. The court reached this conclusion by saying that one who counsels or advises was an accessory before the fact at common law, and under common law rules could be prosecuted in the venue where the accessorial acts are performed. Therefore, reasoned the court, when Congress enacted that he who counsels or advises is a principal

(18 U. S. C. §2) it provided "an additional venue" (831). The court overlooked two things.

First. There is not, never was, any federal common law. All federal criminal law is purely statutory.

United States v. *Hudson,* 7 Cranch (11 U. S.) 32.

The present statute (18 U. S. C. §2) was originally enacted as §332 of the Federal Penal Code of 1910. Before that, although there were a few statutes making him who aids or abets, counsels or advises, equally guilty with him who actually does the forbidden act (*e.g.,* R. S. 5325, 5334, 5335) there never was a statute defining the offense of an "accessory before the fact." Since the offense of being a principal and the offense of being an accessory are different (1 Bishop New Crim. Law §663) there never was a time when an accessory before the fact could be prosecuted as such in a federal court.

Beauchamp v. *United States,* 154 Fed. (2d) 413, 415-416; cert. den. 329 U. S. 723; rehearing den. 329 U. S. 826;
United States v. *Ramsay,* 27 Fed. Cas. #16115.

Therefore the Court of Appeals erred in saying that the statute making the abettor a principal "broadens * * * the venue jurisdiction inherited from English law" (831) because no venue jurisdiction was inherited from English law, and what never existed cannot be "broadened."

Second. The crime charged in the indictment is interstate *transportation.* 18 U. S. C. §2 does not say that it is a crime to aid or abet, counsel or advise. It says that he who does so is a principal, that is, he is guilty of the substantive offense, not of the different offense of aiding and abetting. In other words, if petitioner is guilty of anything it is not

of aiding and abetting but of the transportation itself, and that transportation took place in a district without the jurisdiction of the court.

Under the Sixth Amendment crimes must be prosecuted in the district in which the *crime* was committed; in this case, in a district from which or through which transportation took place. It has always been the law that under the Sixth Amendment venue does not depend on the place where the defendant resides or happens to have been at some time or other, but on the "district or districts within which the offense was committed."

> *United States* v. *Anderson,* 328 U. S. 699, 704-705; *Haas* v. *Henkel,* 216 U. S. 462.

This "offense," whoever committed it, was committed beyond the jurisdiction of the court.

But even if one may be prosecuted in a district where he only counsels or advises and where no substantive act takes place, surely he cannot be convicted on an indictment which charges an act different from the one proved. The indictment charges transportation within the jurisdiction of the court. The contrary was proved. We do deny that one who merely aids or abets may be indicted for having performed the act. That is not the point. The act charged (transportation from the Southern District) was not proved. Something quite different was proved. Neither petitioner nor anyone else committed the offense of interstate transportation within the jurisdiction of the court. If petitioner was to be prosecuted in a different district than that wherein transportation took place on the theory that he gave some advice there, he should have been so apprised. The Sixth Amendment requires that a defendant "be informed of the nature and cause of the accusation." This indictment did not inform. It deceived.

FOURTH

Over petitioner's objection a government witness was permitted to testify that, in petitioner's absence, "I was told by Joseph Di Palermo that if anything went wrong I had nothing to worry about in this case and that Gillette was backing the deal" (204-205). The Court of Appeals excused this on the theory that the statement was "made to encourage Larigan, newly admitted to the conspiracy, to act as a check passer" (1832). There is no evidence that it was so made, or that Larigan needed any encouragement.

The government's witness Larigan was testifying on direct. He testified that there was a restaurant meeting on the night of August 19, 1949. He said that petitioner left the meeting. Then this occurred:

> "Q. After Gillette and Turiano had left, did you have any conversation with Joseph Di Palermo about Gillette and Gillette's part in this deal that had been discussed? A. I did, and was told by Joseph Di-Palermo that Gillette—
>
> "Mr. Corbin: I object.
>
> "Mr. Cohn: Does not the testimony of this witness clearly furnish the basis from which the jury can find that Joseph Di Palermo was co-conspirator of Gillette from the statements made by him?
>
> "The Court: I think you are right. I will allow it.
>
> "Q. *Will you tell us, according to his Honor's ruling, what conversation you had with Joseph Di Palermo, what you asked him and what he told you?* A. *I was told by Joseph Di Palermo that if anything went*

wrong I had nothing to worry about in this case and that Gillette was backing the deal.

"Mr. Smith: I move to strike that out. It has nothing to do with the scope of the conspiracy; it is brought in here as hearsay. I respectfully object to it as hearsay" (204-205).

The statement of one conspirator is sometimes admissible against another, not as an exception to the hearsay rule, but on the theory that the statement is an *act* in the execution of the conspiracy and evidential of its scope.

Admissible declarations are considered in the nature of overt acts (*Fiswick* v. *United States,* 329 U. S. 211, 216-217; *Pinkerton* v. *United States,* 328 U. S. 640, 646-647), or, as older cases put it, as part of the *res gestae* (*Wiborg* v. *United States,* 163 U. S. 632, 657), or, as Chief Judge Learned Hand of the court below stated in another case (*United States* v. *Renda,* 56 Fed. [2d] 601, 602),

"The declarations of one party to a concerted mutual venture are admitted against the rest on the notion that they are acts in its execution."

The conspiracy charged here was to transport forged checks in interstate commerce. The gossip between Larigan and Di Palermo was not spoken in the course of moving checks, did not tend to move checks, and was not spoken for that purpose.

The statement that "Gillette was backing the deal" was a pure narrative conclusion. It was nothing more than Di Palermo's supposition, drawn from something which somebody (not necessarily petitioner) had said or done; or it may have been pure imagination. Therefore, the result was that there was permitted against petitioner a statement by someone not in court, not made in peti-

tioner's presence, a statement not of anything said or done by petitioner which could be contradicted, but a conclusion drawn from sources unknown and which could not be inquired into.

Narrative statements by a co-conspirator are never admissible on the theory that they are acts in the execution of the conspiracy.

> *United States* v. *Goodman,* 129 Fed. (2d) 1009, 1013;
> *Van Riper* v. *United States,* 13 Fed. (2d) 961, 967;
> *People* v. *Davis,* 56 N. Y. 95, 103.

The Court of Appeals excused the admission of this testimony on the ground that it "was properly admissible as a statement made to encourage Larigan, newly admitted to the conspiracy, to act as a check passer" (832). There are two answers to this. First, it was not a part of the conspiracy that Larigan should be encouraged to do anything. Second, the evidence indicates no such purpose. Larigan had been handling forged checks since childhood (192-193, 233-244). He needed no encouragement. A substantial time before this alleged declaration of Di Palermo was made Larigan had said, as he testified:

> "I was willing to participate in any check-cashing scheme.
>
> * * * * *
>
> "Mr. Turiano offered me 15% of all checks that I would cash * * * I agreed to Mr. Turiano's proposition" (202).

This Court has recently pointed out the abuses of the conspiracy count by federal prosecutors (*Krulewitch* v. *United States,* 336 U. S. 440). Nevertheless, federal prose-

cutors persist. A federal indictment against more than one defendant which does not have a conspiracy count tacked at the end is a rarity. These prosecutors know that "A co-defendant in a conspiracy trial occupies an uneasy seat." (*Krulewitch* v. *United States, supra,* p. 454.) The very purpose of the conspiracy count is to permit proof of all sorts of acts and declarations which have no connection with the defendant himself, but are those of another alleged "conspirator."

These admonitions go unheeded. There is no remedy except to hold rules of evidence strictly within their present limits.

Dated, July 13, 1951.

Respectfully submitted,

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